Supreme Court, U.S.
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No. 95-1532

In The

Supreme Court of the United States

October Term, 1995

CHARLES W. LINDENMEIER, et al.,

Petitioners,

vs.

SIEMENS POWER CORPORATION, et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the district court and the court of appeals correctly concluded that Petitioner's Complaint, alleging that their employer had made certain changes to welfare benefits in breach of an alleged promise, failed to state a claim for breach of fiduciary duty under the Employee Retirement Income Security Act of 1974 (ERISA).

2. Whether this Court's decision in *Varity v. Howe*, 116 S. Ct. 1065 (1996) is in conflict with or alters the well established principles followed in *Curtiss-Wright Corporation v. Schoonejongen*, 115 S. Ct. 1223 (1995), that welfare benefits are not vested under ERISA, that an employer's express reservation of the right to change welfare benefits is valid and effective, and that an employer, acting in its settlor capacity, making a change in welfare benefits does not violate fiduciary duties under ERISA.

PARTIES TO THE PROCEEDINGS

Petitioners are Charles H. Lindenmeier, Margaret K. Ballard, Joan K. Lusty, Richard H. Nelson and William W. Porath, individually and purportedly as representatives of an uncertified class alleged to consist of certain present and former employees of Respondent, Siemens Power Corporation. Respondents are Siemens Power Corporation and its parent, Siemens Corporation. Siemens Corporation is a wholly owned subsidiary of Siemens, A.G., a German corporation.

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BRIEF IN OPPOSITION

Respondents, Siemens Power Corporation and Siemens Corporation, respectfully request the Court to deny the Petition for Writ of Certiorari which seeks review of the Ninth Circuit's unpublished Memorandum Decision below. (Appendix A to the Petition).

STATEMENT OF THE CASE

Having been dismissed under Rule 12(b)(6) for failure to state a claim upon which relief can be granted, the Complaint (Appendix F to the Petition) and its deficiencies are central to the rulings made below and to the conclusion that no issue is presented that merits grant of the Petition for Certiorari.

The Complaint's structure and the detail of the evidentiary facts alleged therein, made it possible for the substance of Plaintiffs' claim to be ascertained with great clarity very early in the proceedings. Although the Complaint was 85 paragraphs in length, the heart of the Petitioners' allegations are that promises about what the employee benefit plans would be after the sale of Exxon Nuclear Company, Inc. by Exxon Corporation to Siemens (which promises were allegedly made in statements outside plan documents) were breached. It is alleged that *five years after the acquisition* certain changes were made by

the employer to the employee welfare benefits. Paragraph 2 of the Complaint reads:

> Pursuant to a direct contractual promise made to plaintiffs and under the acquisition agreement hereinafter described, defendants promised and agreed to provide the same or equal pension and welfare benefits as Exxon's benefits at the time of the acquisition.[1]

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[1] The exact promise that was made is set forth in the Acquisition Agreement alleged in the Complaint and expressly stated that the new shareholder had an obligation to provide comparable (not identical) benefits *only for a six-month period* following the acquisition in 1986:

> 7.1 **Employees of ENC, ENII, and EN GmbH**. *For a period of six months following the Closing Date,* KWU [Siemens] shall cause ENC, ENII, and EN GmbH to offer continued employment to substantially all of their employees . . . as of the Closing Date with substantially comparable salaries and other terms and conditions of employment. However, *nothing in this Agreement shall be deemed to prevent or restrict in any way the right of KWU and its Affiliates* (including ENC, ENII, and EN GmbH) *following the expiration of such period* to terminate, reassign, promote or demote such employees, or *to change* adversely or favorably the titles, powers, duties, responsibilities, functions, locations, salaries, other compensation, or *terms and conditions of employment* of such personnel. . . .

ER 41:¶ 3, Exh. E at E-2 (emphasis supplied).

Paragraph 3 alleged that this promise was kept and that such a benefit plan was adopted[2] and implemented unchanged for five years following the acquisition – four and one-half years longer than the alleged promise required. Paragraph 4 alleges:

> Defendants then reneged upon their obligations and announced the unilateral elimination of and reductions in certain of plaintiffs' benefits. As described hereinafter, defendants' *elimination and reduction of pension and welfare benefits violate the direct promises and agreements* made to plaintiffs, the acquisition agreement described *infra*, Federal Common Law, ERISA, and State Law. (emphasis supplied).

The specific factual allegations of the Complaint (¶¶ 19-44) plead the evidence that is relied upon to establish the general factual assertions in paragraphs 2 through 4. The balance of the Complaint consists of jurisdictional allegations (¶¶ 5-18) and conclusory legal contentions (¶¶ 45-85) designed to try to fit the core facts into any one of nine "Counts" or causes of action including: breach of plan terms, breach of contract, breach of third party beneficiary contract, tortious denial of existence of a contract, breach of fiduciary duty, promissory estoppel, equitable estoppel, declaratory and equitable relief under ERISA, and injunctive relief.

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[2] Although the employer entity remained the same corporation with a changed name, the benefit plans in effect prior to the acquisition were administered by the former parent and selling shareholder, Exxon Corporation. Accordingly, new plans had to be adopted following the acquisition by the new shareholder.

In response to Respondents' 12(b)(6) Motion to Dismiss, Petitioners chose to go well beyond the Complaint and inundated the district court with 662 pages of deposition testimony and ERISA plan documents. Following a careful review of the Complaint, the district court correctly stated the essence of Petitioners' case:

> The crux of plaintiffs' nine climes [sic] for relief is that Siemens was not free to have reduced or eliminated plaintiffs' pension and welfare benefits under ERISA and federal common law.

(Petition at 16a). Since the law is clear that an employer does have the right to change welfare benefits[3] offered to its employees, especially when it has clearly reserved the right to do so, the district court granted the motion and dismissed the case.

Petitioners moved the district court to reconsider its Order on Motion to Dismiss. The district court denied the Motion for Reconsideration. Although Petitioners never moved for leave to amend their Complaint, the district court construed the Motion for Reconsideration as such a

---

[3] The changes in benefits consisted of a change in the percentage of premiums that employees were required to pay for dependent coverage in the medical and dental plans, an increase in the annual deductible, and a change to other insurance plans that it offered. Although Petitioners make careless use of the term "pension benefits", no vested pension benefits were changed, only unvested welfare benefits. ER 29:¶ 2, Exh. A (detailing specific changes to Siemens welfare benefit plans).

request and denied it. (Petition at 33a). With the benefit of the large record before it, the district court concluded:

> The court finds that plaintiffs can prove no set of facts entitling them to relief under the legal causes of action set forth in the complaint.

(*Id.*) Therefore, the district court denied Plaintiffs' unstated request for leave to amend, and denied the Motion for Reconsideration. (Petition at 34a). No challenge to the denial for leave to amend is being made by Petitioners.

Petitioners appealed. They placed before the appellate court the entire factual record on the Motion to Dismiss, including 624 pages of deposition testimony. The court of appeals affirmed in a not-for-publication Memorandum. (Petition at Appendix A). It correctly applied the law to the alleged facts, when it determined that this Court's decision in *Curtiss-Wright Corporation v. Schoonejongen*, 115 S. Ct. 1223 (1995) controlled. (Petition at 6a).

Petitioners argued their case for a fourth time in their Petition for Rehearing. The court of appeals denied the Petition for Rehearing. (Petition at 14a). The Petition for Writ of Certiorari seeks relief only as to the application of the fiduciary duty "Count" to the facts alleged. Dismissal of the Complaint based on the eight other "Counts" is not challenged. The Petition, as to the fiduciary duty count should be denied for the reasons set forth below.

REASONS FOR DENYING THE WRIT

I. This Case Presents Merely an Issue as to Whether Petitioners Have Artfully Pleaded A Specific Claim.

The issue presented by this case relates only to whether the Complaint, which arises from and alleges a unique and specific set of detailed factual circumstances, was correctly read by the district court and by the court of appeals as failing to state a claim for which relief can be granted. As such, the issue goes merely to the adequacy of Petitioners' pleading.

The courts below were fully capable of carefully and accurately analyzing the Petitioners' Complaint and of applying controlling rules of law in making the determination that no claim was stated. The Complaint was scrutinized originally upon the motion and again on reconsideration by the district court and on the original appeal and again on application for rehearing by the court of appeals. After four such reviews, this case presents no need for this Court to also assess the adequacy of Petitioners' pleading.

Even if this Court were to take a different view of the adequacy of the Complaint, that is not grounds for granting the Petition. "A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." Rule 10. There is no improper statement of law in this case and the Petition points to none.

There is no factual record upon which this Court can render a ruling of law on any issue of substantive importance. If there were an issue in need of being addressed

by this Court, the better course would be to await the presentation of a case with a fully developed factual record. This is a pleading case, properly left in the hands of the courts below, which does not present such a record nor such need nor such opportunity.

II. The Court of Appeals Correctly Followed the Applicable Decision of This Court: *Curtiss-Wright v. Schoonejongen.*

The court of appeals correctly stated and followed this Court's decision in *Curtiss-Wright Corp. v. Schoonejongen*, 115 S. Ct. 1223 (1995):

> It is clearly established that welfare plans are not subject to the vesting requirements of ERISA. 29 U.S.C. § 1051(1); *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 90-91 (1983). "Because benefits under a welfare plan are generally neither vested nor accrued, an employer may amend or terminate benefits pursuant to the terms of the plan at any time." *Cinelli v. Security Pacific Corp.*, 61 F.3d 1437, 1441 (9th Cir. 1995). All that is required of a reservation clause (a clause that provides a procedure for altering welfare benefits in a plan) is a statement that a company reserves the right to amend at any time. *Curtiss-Wright Corp. v. Schoonejongen*, 115 S. Ct. 1223, 1229 (1995). Because the Siemens plan contained such a statement, Siemens was, and is, free to alter welfare benefits.

(Petition at 6a).

The court of appeals then pointed out a critical flaw in the argument of Petitioners that new-owner Siemens

had an obligation to continue the pre-existing benefits granted by ENC under the outgoing Exxon ownership:

> The Exxon plan also contained a reservation clause. Because Exxon was free to change their plan at any time, letters by Siemens or Exxon officials attesting to maintain Exxon benefits are not relevant. Siemens, like Exxon, was free to change its plan.

(*Id.*) (footnote omitted). A promise to replace a benefit plan administered by Exxon that could be changed, by a similar plan to be administered by Siemens that also could be changed, gives rise to no cognizable claim when years later the right to make changes is exercised.

Turning to Count V (Breach of Fiduciary Duty), the court of appeals applied a principle approved by this Court in *Curtiss-Wright*:

> It is established precedent in this circuit that *an employer does not act in a fiduciary capacity when deciding to amend or terminate an ERISA benefit plan.*

(Petition at 10a) (emphasis added).

This Court's analysis in *Curtiss-Wright*, leading to its consideration of the central question of that case (whether or not *Curtiss-Wright* amended its plan in a permissible manner), follows the same reasoning:

> In interpreting § 402(b)(3), we are mindful that ERISA does not create any substantive entitlement to employer-provided health benefits or any other kind of welfare benefits. Employers or other plan sponsors are generally free under ERISA, for any reason at any time, to adopt, modify, or terminate welfare plans. See *Adams v.*

> *Avondale Industries, Inc.*, 905 F.2d 943, 947 (CA6 1990) (*"[A] company does not act in a fiduciary capacity when deciding to amend or terminate a welfare benefits plan"*).

Curtiss-Wright v. Schoonejongen, supra, 115 S. Ct. at 1228 (emphasis added). This Court then concluded:

> Accordingly, that Curtiss-Wright amended its plan to deprive respondents of health benefits is not a cognizable complaint under ERISA; the only cognizable claim is that the company did not do so in a permissible manner.

(*Id.*)

The decision of the court of appeals to affirm dismissal of the fiduciary duty claim is perfectly in accord with the law as announced by this Court. The lower court did not decide "an important federal question in a way that conflicts with relevant decisions of this Court." Therefore, under Rule 10 there is no reason for issuance of a writ of certiorari.

III. The Allegations in Petitioners' Complaint Bear No Resemblance to the Facts Found in *Varity v. Howe.*

A reading of the Complaint reveals how badly Petitioners have misstated the record when they assert that they "pled a claim like the one recognized by this Court in [*Varity Corp. v. Howe*, 116 S. Ct. 1065 (1996)]." (Petition at 8). The allegations in this Complaint are nothing like the facts in *Varity*. Review of the Complaint and the description of it in the Memorandum Decision by the court of appeals dispels Petitioners' wishful thinking that

this case is similar to *Varity*. The court of appeals' description of the allegations was:

> Plaintiffs brought this class action on behalf of approximately 600 current and recently retired employees of defendant Siemens Power Corporation who were participants in the employee welfare and pension plan offered by ENC [Exxon Nuclear Company]. On or about December 31, 1986, Siemens acquired ENC from Exxon (ENC's parent) pursuant to the terms of a stock purchase agreement.
>
> Plaintiffs claim that Siemens expressly agreed to continue to provide ENC employees with pension and welfare benefits equal to benefits they were entitled to receive under the Exxon plan. Plaintiffs contend that Siemens provided benefits to plaintiffs, similar to those provided by Exxon, for more than five years before unilaterally altering the pension and welfare benefit package.

(Petition at 2a-3a) (footnote omitted).

Petitioners' allegations stand in stark contrast to the facts of the *Varity* case, in which the trial court found that the employer had, through "serious deception" and "trickery", persuaded its employees to switch employers and join a new company that the defendant foresaw would fail, for the express purpose of shedding its obligations to the employees whom it induced to leave. *Varity Corp. v. Howe, supra*, 116 S. Ct. 1065, 1068 (1996). A decision made by Siemens to increase the amount of the deductible that employees must pay on their health insurance is hardly comparable to the facts found to exist in *Varity*.

Petitioners in the Petition at page 2 assert that they have pled a "specific claim for breach of fiduciary duty" citing the Court to Appendix 62a-63a of the Petition where paragraphs 61 to 67 of the Complaint are found. However paragraphs 61 through 67 of the Complaint contain no factual allegations. At paragraph 64, Plaintiffs merely recite the list of fiduciary duties found in the statute. *See* 29 U.S.C. § 1104(a). However, parroting the language of ERISA is not enough to state a claim for breach of fiduciary duty. *Haber v. Brown*, 774 F. Supp. 877, 879 (S.D.N.Y. 1991) (dismissing claim for breach of fiduciary duty where the plaintiff merely incorporated the terms of the statute without alleging a single fact to support its allegation).

The factual allegations elsewhere in the Complaint are that promises in various forms were made as to what features the benefits plans would contain when adopted and that they would not be changed. An allegation that changes were made to a benefit plan does not state a claim for breach of fiduciary duty. Petitioners have recognized the futility of even asking this Court to review the dismissal of their real claim, the contract claim for the alleged broken promise, and do not do so.

Petitioners wish to "repackage" this case about a change in benefits into a fiduciary duty case, but they have not and cannot assert facts[4] that bring their lawsuit within the ambit – or even the penumbra – of this Court's decision in *Varity*.

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[4] Petitioners *cannot assert* such facts for three reasons: first, they don't exist; second, they never moved below for leave to amend their complaint; third, they have not challenged in this Court the denial below of an opportunity to amend.

IV. *Varity Corp. v. Howe* Pronounced No New Law Applicable to This Case.

This Court's recent decision in *Varity Corp. v. Howe*, while prompting Petitioners to eagerly attempt to repackage their dismissed case as a fiduciary duty case, nonetheless provides no reason to grant certiorari. The principles of *Varity* do not apply to this case, and in any event, those principles were briefed and argued below and are not new authority.

A. *Varity* Issues Are Not Present In This Case.

This case was correctly decided under this Court's decisions in *Shaw v. Delta Air Lines* and *Curtiss-Wright Corp. v. Schoonejongen*. *See* discussion at pp. 7-9 above. Analysis of the *Varity* opinion demonstrates that the legal principles of that case do not reverse or modify *Curtiss-Wright Corp. v. Schoonejongen* and they do not pertain to this case.

The principal legal issue before this Court in *Varity* was whether ERISA authorized an award of relief to individual beneficiaries for breach of fiduciary duties, as distinguished from relief for the plan itself. However, a review of the record of the decisions in this case reveals that that issue is simply not in this case. The standing of the Plaintiffs to assert fiduciary duty claims was not challenged and was not the basis of the dismissal of their claims. Their claims were dismissed not because they lacked standing to bring them, but because they lacked merit under the specific facts alleged.

The second issue addressed in *Varity* was whether the employer in *Varity* was acting in its fiduciary capacity when it engaged in its "deliberate deception." This provides another fundamental distinction between Petitioners' claims and the doctrine of the *Varity* decisions. The decision in that case arises from the finding of the district court that "Varity was wearing its 'fiduciary,' as well as its 'employer,' hat." *Varity Corp. v. Howe, supra,* 116 S. Ct. 1065, 1071 (1996). *Varity* did not challenge that finding. (*Id.*) There is no such factual finding in this case. The *Varity* case therefore came to this Court in the exact opposite posture of the current one, in which the lower courts concluded that Respondents (according to these Petitioners' own allegations) were not acting in a fiduciary capacity. (Petition at 10a).

The specific facts of *Varity* do not change the well established rule quoted by this Court with approval that *"A company does not act in a fiduciary capacity when deciding to amend or terminate a welfare benefits plan". Curtiss-Wright Corp. v. Schoonejongen, supra,* 115 S. Ct. at 1228. *See Amalgamated Clothing & Textile Workers v. Murdock,* 861 F.2d 1406, 1419 (9th Cir. 1988); *West v. Greyhound Corp.,* 813 F.2d 951, 955-56 (9th Cir. 1987); *Cunha v. Ward Foods, Inc.,* 804 F.2d at 1432-33.

This Court gave deference to the trial court's factual findings in *Varity*:

> In reviewing this legal conclusion, we give deference to the factual findings of the District Court, recognizing its comparative advantage in

> understanding the specific context in which the events of this case occurred.

116 S. Ct. 1065, 1071 (1996).

The district court in this case, and the court of appeals, had a voluminous evidentiary record submitted by Petitioners to consider. While the district court did not engage in fact-finding, it had the benefit of a large record submitted by Petitioners that included the testimony of the senior Exxon Nuclear executive who negotiated with Siemens regarding the issue of employee benefits prior to the acquisition. The district court concluded:

> The court finds that plaintiffs can prove no set of facts entitling them to relief under the legal causes of action set forth in the complaint.

(Petition at 33a). If this Court were to issue a writ of certiorari, it could not reach the legal issues presented by Petitioners without first redoing and then rejecting the factual analysis of the lower courts. Petitioners sprinkle their Petition with assertions that both lower courts made mistakes about the facts of the case. *See* Petition at 3 n.2, 11, 12. Those claims do not provide a basis, under the standards of Rule 10, for issuing a writ.

Finally, with regard to the third issue in *Varity*, the substantive breach of fiduciary duty, as previously discussed, the facts of *Varity* are quite different from those alleged in this case. While the Complaint is replete with allegations that a promise was made and then broken five years later by changes to the benefits, there are no allegations of deliberate deception, intentional misrepresentations or trickery.

None of the three issues addressed in *Varity* have applicability to the allegations of this case.

B. The Principles of *Varity* Have Already Been Considered and Are Not New to This Case.

Petitioners proposed second question presented is whether the case should be reversed and remanded for the court below to consider the recent holding of *Varity*. It is a bogus question for two reasons: first, as discussed above, the standing of individual plan participants and beneficiaries that controlled the outcome in *Varity* never arose below in this case and second, the principles of *Varity* have already been considered. There is no reason to do it again.

The conflict between the circuit courts that was resolved in *Varity* (relief for individuals) was not an issue before the Ninth Circuit in this case before, and there is no reason for it to be before it on remand. It has nothing to do with this case. Respondents never asserted that Plaintiffs' lawsuit failed because individual plan participants and beneficiaries had no right to state a claim for breach of fiduciary duty under ERISA. The district court did not dismiss the case because Petitioners lacked standing, and the court of appeals did not affirm the dismissal on that basis. Petitioners had the *right to* state a claim, they just failed to do it in the Complaint. This Court's resolution of the issue in *Varity* in favor of individual plan participants and beneficiaries had absolutely no bearing on this case in the first instance, and there is therefore nothing to reconsider on remand.

Furthermore, the principles of *Varity* are *not* new to this case. The decision that was affirmed in *Varity*, i.e., *Howe v. Varity*, 36 F.3d 746 (8th Cir.), *clarified*, 41 F.3d 1263 (8th Cir. 1994), was cited in Petitioners' Rule 28(j) letter to the Ninth Circuit dated September 6, 1995 presenting additional authorities before oral argument, was argued before the Ninth Circuit at oral argument (Transcript of Hearing, Petition at 89a) and was briefed by Petitioners in their Petition for Rehearing (Petition for Rehearing, at pp. 2 and 6).

The principles pronounced by the Eighth Circuit Court of Appeals and subsequently affirmed by this Court were before the Ninth Circuit Court of Appeals when this case was decided and the applicability or lack of applicability of those principles to this case was fully and properly considered. While this Court's recent affirmance of the decisions below in *Varity* lends greater authoritative weight to the principles previously announced by the Eighth Circuit, it does not provide any *new* law not previously considered by the Ninth Circuit in this case. That those authorities were recently *affirmed* by this Court necessarily means that there was no change in the law effected by *Varity*. There would be no point to remanding this case to the Ninth Circuit to consider the same authorities again.

CONCLUSION

Petitioners present two arguments for issuing a writ of certiorari. As shown more fully in the discussion above, neither argument is pertinent or supported by the record.

Petitioners' first argument is: "This case should be resolved in accordance with *Varity*." (Petition at 8). This argument must fail because the facts and legal principles of *Varity* are inapposite to the claims of Petitioners, and in any event those legal principles, if not the most recent decision affirming them, were before the court of appeals and were fully considered.

Petitioners' second argument is: "ERISA provides a statutory basis for relief for defendants' misrepresentations and a direct right of action for participants or beneficiaries." (Petition at 10) This argument for issuance of certiorari must fail because the courts below did not deny Petitioners a direct right of action under ERISA. Notwithstanding that Petitioners were allowed standing to assert such an action, the courts below correctly found that Petitioners had not stated a cognizable claim.

The petition should be denied.

Respectfully submitted,

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